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HAROLD B. WILLEY, Cl

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 83

PALACE CORPORATION,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

LEO FIXLER,
Counsel for Petitioner.

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1234 mobile expansible houses, the other, covering their transportation, erection and installation at various Government sites.

Count I alleges a wrongful withholding of $32,504.26 of the contract price which Respondent retained "* * * for the correction of moisture conditions in mobile units whatever the cause" (R. 2, 16), under a one year guaranty clause (R. 10).

Count V, closely related, seeks to recover $56,477.21 expended by Petitioner to make certain roof repairs directed by Respondent and upon its unilateral determination that it was Petitioner's responsibility to make them under that guaranty.

Count III seeks extra costs of $78,404.96 because of extraneous conditions encountered in the performance of the erection and installation of the units.

Count IV seeks damages for delays and in changing sites.

Respondent's motion for summary judgment was granted as to Counts I, III, IV and V but denied as to Count II.

On the ground that only fact questions are presented in Counts I, III, IV and V, the Court below has granted Respondent's motion for summary judgment because of the standard disputes clause (R. 102) and the absence of any allegation of fraud.

Statutes Involved

U. S. Constitution, Article III, Section 2.

Defense Appropriation Act of 1953, Title VI, Section 635.

Jurisdiction to Review

Jurisdiction of this Court is invoked under Title 28 U. S. Code, Sections 1255(1), 1651 (a) and 2101 (c). The judgment of the Court of Claims of the United States was entered on March 3rd, 1953 (R. 99).

Questions Presented

Whether, as held below, the claims herein involve only fact questions controlled by the standard disputes clause (R. 102) so that, by reason of the contracting officer's adverse decision, Petitioner may not have a trial on the merits.

Reasons Relied Upon for Allowance of Writ

The Court below has, in effect, said that it is precluded from passing upon the merits of Petitioner's claims as only fact questions are presented, and since fraud is not alleged, the decision of the contracting officer, affirmed by the Head of the Department, is final.

In U. S. *v.* Wunderlich, 342 U. S. 98, the parties stipulated that the question decided by the Department Head was one of fact. That is not the situation here.

It is respectfully submitted that here, among other things, the claims involve the interpretation of the warranty clause. The record will reveal that the contracting officer charged Petitioner with a responsibility under the guaranty provision upon the theory of liability foreign to its language and intent.

Petitioner is entitled to a trial on the merits for—

(*a*) The claims present questions of law.

(*b*) It was never intended that the standard disputes clause apply to the guaranty provision.

(*c*) It was never intended that the contracting officer, by reason of Article 15, be designated the sole and exclusive judge of Petitioner's claims against the Government for its breach of contract.

(*d*) The Government has never accounted to plaintiff for the funds withheld under Count I.

(*e*) Recent enactments of Congress (Defense Appropriation Act of 1953, Title VI, Section 635) reflect an intent to the effect that contractor's claims against the

Government be heard by the Court on the merits and are not to be summarily disposed of on the ground that the contracting officer's decision is final under Article 15.

(*f*) The matter is of vital public importance as many contractors hold similar contracts with the Government and will be bound by this determination.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Court of Claims of the United States sitting at Washington, D. C., commending said Court of Claims to certify and send up to this Court on a date to be designated, a full and complete transcript of the Record of all proceedings in said Court of Claims heretofore had in this case to the end that this case may be reviewed and determined by this Court; that the judgment of the Court of Claims insofar as indicated be reversed; and that your Petitioner be granted such other and further relief as may seem proper.

PALACE CORPORATION, *Petitioner,*
LEO FIXLER,
Counsel for Petitioner.

PETITIONER'S BRIEF

A

The Standard Disputes Clause Does Not Apply to the Claims Set Forth in the Complaint

The Court below said "These various claims which we have discussed turn over issues of fact." It concluded that, by reason of the standard disputes article (R. 102), the decision of the Head of the agency, adverse to Petitioner, was final (R. 102) under the authority of *U. S.* v. *Wunderlich,* 342 U. S. 98.

Ordinarily, a motion for summary judgment must be denied where a genuine issue of fact is present. *Associated Press* v. *U. S.,* 326 U. S. 1, 6. But this is not the ordinary case. Here, we deal not so much with the merits of the controversy, but rather, with the question as to the character of the claims, and whether, as a matter of law, they fall under the disputes article to the extent that Petitioner is precluded from having the merits thereof passed upon by the Court.

In the Wunderlich case, *supra,* the parties stipulated that the dispute, decided by the Department Head, was one of fact. In the case at bar, Petitioner contends that the claims involve questions of law, and mixed questions of law and fact, and that, in any event, the issues involved are outside the scope of the disputed article.

The disputes article was intended to prevent interruption in the progress of the work. *Barlow* v. *U. S.,* 35 Ct. Cls. 514.

But, when the work called for under the contract is completed, inspected and accepted, the disputes article having served its purpose, is no longer relevant.

The nature and extent of Petitioner's subsequent liability under a guaranty, presents an entirely different independent problem. So too, is the question of Respondent's liability for any breach of the agreement.

It is respectfully submitted that the Court below has overlooked these distinctions as well as the intent of Congress recently expressed and discussed below.

The Wunderlich case, *supra,* did not alter the rule previously established, that questions of contract interpretation involve issues of law. *U. S.* v. *Moorman,* 338 U. S. 457.

In the Moorman case, this Court said: "The oft repeated conclusion of the Court of Claims that questions of 'interpretation' are not questions of fact is ample reason why the parties to the contract should provide for final determination of such disputes by a method wholly separate from the fact—limited provisions of Section 15."

The Court below usually adheres to that rule.

In *Cramp Shipbuilding Co.* v. *U. S.,* 122 Ct. of Cls. 72, it said: "The question of the retention of discounts * * * was not a 'matter of fact' * * *". "It was a question of the interpretation of a written document, commonly called a question of law."

A similar distinction was made in *Pottsville Casting & Machine Shops* v. *U. S.,* 121 Ct. of Cls., 129. *McWilliams* v. *U. S.,* 118 Ct. of Cls., 1, and *Binghamton Construction Co.* v. *U. S.,* 107 Fed. Sup. 712.

The Court below previously held that a contractor's claim for damages for delays, was one of law outside the disputes articles. *Langevin* v. *U. S.,* 100 Ct. of Cls. 15.

In *Great Lakes Dredge & Dock Co.* v. *U. S.,* 119 Ct. of Cls., 504 (cert. den. 342 U. S. 953), it was held that a contractor was not precluded by the findings of the contracting Officer with respect to extra costs attributable to changed conditions.

Citing *General Steel Products Corp.* v. *U. S.,* 36 F. Supp. 498 and *U. S.* v. *Iovacchini Bros., Inc.,* 116 F. (2nd) 345, *Williston on Contracts,* Rev'd Ed. Vol. 9, Sec. 292, n. 4, says: "But the question as to the measure of damages in a breach of contract is a question of law upon which the court is authorized to decide."

In *Fuller* v. *U. S.*, 108 Ct. of Cls. 70, it was held that claims for extra costs for unreasonable delays due to the actions of the Government, are in effect claims for damages for breach of contract outside the disputes clause.

It is respectfully submitted that the dissenting opinion in the case of *Howard P. Foley* v. *U. S.*, 105 Ct. of Cls. 161, is applicable for in the case at bar, the Government issued notices to proceed, cancelled some, and by its failure to have sites ready, put the Petitioner to considerable extra expense. Furthermore, if Petitioner had not thus been delayed, the units would have been erected soon after their manufacture and, the guaranty of one year, which began from the date of erection rather than the date of manufacture, would have expired much sooner.

Although it denied relief to the claimant in the case of *George H. Evans & Co.* v. *U. S.*, 74 Fed. Sup. 58, the Court below did approve the following rule: "It is true that what has been called a 'constructive condition of cooperation' (Patterson Constructive Conditions in Contracts, 42 Columbia Law Review 903) should be read into the Government contract in this case and under it, 'neither party will hinder the other in his discharge of the obligations imposed upon him nor increase his cost of performance'."

In *Parrish* v. *U. S.*, 120 Ct. of Cls. 100, the distinction was made between instances of delay resulting from some want of diligence on the Government's part as in Fuller *v.* U. S., *supra,* and delays resulting from the exercise by the Government of some right reserved in the contract, as in *Stafford* v. *U. S.*, 109 Ct. of Cls. 479.

In the Parrish case, the contractor had proceeded at his own risk and had been fully compensated at the contract price. In the case at bar, the Government caused the Petitioner to perform services inconsistent with any contract right reserved, and thus, those acts may be characterized as wilful as in *James Stewart & Co.* v. *U. S.*, 105 Ct. of Cls. 285.

While it is not intended in this brief to argue the merits of the entire case, it is necessary to partially discuss them, so that this Honorable Court may observe from their nature and character that they involve questions of law.

As stated above, Counts I and V are related. The Government's right to withhold the $32,504.26 claimed in Count I depends upon the meaning and intent of the guaranty.

Under Count V, the question arises as to whether the expenditure by Petitioner of $56,477.21, made upon Respondent's insistence, was its responsibility under the guaranty in the first instance.

The materials first suggested by Petitioner for the manufacture of the roof of this mobile unit were unavailable because of the emergency. Respondent insisted that cotton membrane be used. The original pilot model had #55 rolled roofing nailed and cemented to the roof sheathing covered with asphalt. When the Government insisted upon a different method, Petitioner requested an alternate provision and Section 12 of the specifications so provide (Ex. "9", R. 77).

Petitioner's roof specification for over 4,000 units manufactured for the Government under prior contracts, developed few roof leaks. The subject contracts were executed under the *Lanham Act,* 42 U. S. C. A. Section 1521(b), which expressly authorized the building of temporary emergency housing to be removed within two years after the end of the emergency, and to be designed to consume minimum amounts of critical materials and standard equipment. For these reasons, substitute materials readily available were specified and the usual performance guaranty was omitted. Petitioner's responsibility was limited to correcting defective material and improper workmanship as therein specified (Petition, Par. 29).

The Respondent says that Petitioner designed this unit. This, Petitioner denies. That is one of the material questions to be resolved.

As early as August 1944, the Government recognized that the roof specifications were defective (Ex. "5", R. 71). Mr. Schwartz, the successor contracting officer, requested an estimate on new roof specifications. A few days later, he withdrew that request and submitted other roof specifications (Ex. "18", R. 93).

The Government's confusion is understandable because their insistence upon the use of Osnaberg cloth for the roof was a mistake and could not be corrected. That is why a subsequent contract issued to Petitioner for the same unit to be delivered in Washington, D. C., had different roof specifications (Ex. "5", R. 71) (Ex. "16", R. 89).

There were undoubtedly conditions which required attention. But the responsibility to make and pay for their repair is a question requiring the interpretation of the guaranty clause in light of the circumstances under which it was authorized by the Government.

In a letter dated January 19th, 1945 (R. 22), discussing the warranty clause, Mr. Schwartz takes issue with Petitioner's contention that moisture caused by condensation was not a condition which fell under it. In that same letter, he states that the guaranty "whether written or implied insures our receiving a habitable dwelling, an article for its intended use." Mr. Schwartz concludes by saying that it was Petitioner's "apparently defective design to which the difficulties were attributable".

As previously stated, Petitioner denies that it designed this unit or that it prescribed the roof specifications (R. 26).

Thus, not only was Petitioner held responsible under an erroneous interpretation of the written guaranty but liable as well for the breach of an alleged "implied" guaranty. Similarly, the withholding of approximately $68,000.00 "for the correction of moisture conditions in mobile units, whatever the cause" (R. 16), was without legal justification.

The so-called "moisture condition" was found to exist not only in these temporary units built of substitute materials, but in permanent housing as well. This statement is from the report of Respondent's Technical Division after comprehensive investigation. In that report, the Technical Division says "Where trouble from condensation has developed, the faulty design or workmanship could not be readily detected. The influence of the various details of construction on condensation is difficult to evaluate and oftentimes simply guess work" (R. 54).

With respect to Petitioner's units, they recommended that the guaranty clause be revised to protect the Government not only from damages resulting from faulty roof construction *but condensation as well. Interlineation supplied* (R. 54, 55).

But condensation and its effects was not Petitioner's responsibility.

Based upon his own opinion as to the nature and extent of Petitioner's responsibility under the guaranty, Mr. Schwartz withheld approximately $68,000.00 (Ex. "15", R. 88). Upon appeal to Mr. Seaver, the Assistant Commissioner, this was reduced to $32,504.26, the amount sued for under Count I. Commissioner Seaver concluded that there was a basis for withholding monies for materials furnished and work performed not in accordance with the contract requirements. While a schedule of repairs to be made was submitted to Petitioner, at no time was it supplied with a break-down of the alleged defective materials or the respects in which the workmanship was defective. Nor to this date has Petitioner been apprised as to where and how that money was expended.

In a letter dated January 28, 1946, Commissioner Klutznik reviewed Mr. Seaver's determination and said: "With particular reference to your discussion of roof leaks and condensation * * * I find that Mr. Seaver found * * * that Palace Corporation was liable only in those instances where unquestionable roof leaks were involved

and where condensation was not a contributing factor. Further, I find that conditions on DC-49104 were not the same as in MICH-20213. In DC 49104, an entirely different roof was specified and installed" (R. 55).

Petitioner agrees that a different roof was specified for the DC project and the reasons therefore appear above. But, evidently, Commissioner Klutznik was not familiar with the report filed by his own Technical Staff and their conclusion that "Condensation, however, appears to be a contributing factor" (R. 56).

Moreover, he overlooked the fact that funds were withheld "* * * * for correction of moisture conditions in mobile units, whatever the cause" (R. 16, 28), and this, the Technical Staff say is guess work.

It is also obvious that if Mr. Schwartz was approximately 50% wrong in withholding $68,000.00 for the correction of moisture conditions not Petitioner's responsibility, having been reversed by Assistant Commissioner Seaver to that extent, he was just as wrong in forcing Petitioner to spend approximately $56,000.00 to correct the same conditions attributable to the same causes (Count V).

We believe the rule to be that it is Respondent's burden to affirmatively establish that the decisions of the Head of the Department concern fact questions rather than disputes as to the law. *U. S.* v. *Johnson,* 119 Ct. of Cls. 707.

If a contracting officer is presumed to have authority to pass upon a contractor's responsibility under a guaranty intended to be limited in its application for the reasons expressed herein, it is doubtful that anyone would accept a Government contract under those circumstances for, it would be impossible ever to know the nature and extent of one's ultimate liability. While it appears to this writer, that the situation falls directly within the observations of Mr. Justice Douglas in the Wunderlich case, we do not go that far. Petitioner asks

that it be given an opportunity to have the question of the extent of its liability under the guaranty clause, if any, determined by the Court on the merits and not in the unilateral fashion exhibited here, without any opportunity afforded Petitioner of checking upon Mr. Schwartz's facts and figures.

It is evident that while the guaranty says one thing, the contracting officer decided Petitioner's responsibility upon his own theory of liability. Petitioner does not say that the contracting officer was guilty of fraud nor is it intended to characterize his actions as being dishonest. Petitioner, however, does say that his interpretation of Petitioner's liability was completely erroneous, and what is more important, the question of its liability is not one which falls within the scope of Article 15.

B

After this Court's decision in the Wunderlich case, *supra,* several bills were introduced in Congress to grant to the Court of Claims jurisdiction to review decisions of contracting officers as to questions of fact. None has as yet, been passed. However, the intent of Congress has recently been expressed in the Act of July 10th, 1952, known as the Department of Defense Appropriation Act of 1953, Title VI, Section 635, which provides in part:

"No funds contained in this article shall be used for the purpose of entering into contracts containing Article 15 of the standard contract until and unless said article is revised and amended to provide an appeal by the contractor to the Court of Claims within 90 days of the date of decision by the Department concerned, authority for which appeal is hereby granted."

Perhaps with this statement of intent by Congress, this Honorable Court may be inclined to re-consider its holding in the Wunderlich case.

In conclusion, we respectfully urge that for the reasons set forth above, Petitioner should be given its day in Court and not summarily deprived of that right because of a unilateral determination of a layman as to the meaning and intent of the guaranty and the nature and extent of Petitioner's liability thereunder.

Respectfully submitted,

LEO FIXLER,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 83

PALACE CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 99-105) is reported at 110 F. Supp. 476.

JURISDICTION

The judgment of the Court of Claims was entered on March 3, 1953 (R. 104-5). The petition for a writ of certiorari was filed on May 20, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, in a suit on Government contracts containing standard dispute clauses, the Court of

Claims properly granted the Government's motion for summary judgment on the grounds that the contract breaches relied upon by petitioner involved only questions of fact and that, accordingly, the contracting officer's denial of the same claims, affirmed by the head of the department, were final.

CONTRACT PROVISIONS INVOLVED

Pertinent portions of the contract are set forth in the Appendix, *infra,* pp. 12-14.

STATEMENT

This action was based on alleged breaches of two contracts between petitioner and the Government whereby petitioner had agreed to manufacture, transport and erect 1234 prefabricated houses at sites in Akron and Cleveland, Ohio, and Detroit, Michigan (R. 1, 2). Each contract contained a standard disputes clause (see Appendix, *infra,* pp. 12-13), whereby all questions of fact arising under the contract were to be submitted to the contracting officer whose decision, upon affirmance by the designated department head, was to be final. All grievances included in this action had previously been submitted, in accordance with the contract procedure, to the contracting officer and, upon his rejection, to the head of the department who, after appropriate hearings and consideration, affirmed the contracting officer's decision (R. 6, 10, 11-12). Subsequently, petitioner submitted all claims for reconsideration under the disputes clause and again, after due review by both contracting officer and department head, the claims were denied (R.

34-41). All claims were resubmitted to the head of the department a second time and once more the previous rulings were reaffirmed (R. 43-49). After rejection of its claims under the disputes article, petitioner commenced this action in the Court of Claims.

Petitioner's claims, set forth in five counts of its complaint (R. 1-12), fall into four main categories:

(a) The contractor had guaranteed each unit "against defective material and workmanship, including * * * roof leaks due to causes other than physical abrasion or tearing * * *" for one year from the date of final acceptance by the Government of each unit (R. 10). Petitioner alleged that the Government represented to it that damage to panels, electrical fixtures and other installations were caused by leaking roofs which, in turn, were the result of defective material and workmanship; and that, under its guarantee, petitioner was responsible for repair of those conditions (R. 1-2, 10-12.) Petitioner alleged it was compelled to make repairs to the extent of $56,477.21, although it claims the conditions complained of were not due to roof leaks but were caused mainly by condensation, high humidity and the nature of the material specified due to wartime conditions (R. 11). Also alleged was a wrongful withholding of $32,504.26 of the contract price retained by the Government to pay for the remaining repairs of the same type which petitioner refused to make (R. 1-2).

(b) Petitioner asked $78,404.96 for extra costs due to extraneous materials encountered in the course of excavation (R. 5). These materials con-

sisted of concrete, brick, stone, steel, etc. requiring the use of dynamite, handbars, air tools and torches for their removal and that the contour of the ground required additional skirting, higher berms and because of greater foundation depth added plumbing was necessary (R. 4). Three change orders had been issued (R. 5) allowing petitioner $46,117.23 for soil conditions and extra depth of foundations. Subsequently, petitioner claimed this $78,404.96 in extra costs to cover carpenter rate increases, extra earth berms, and excess costs of foundations, sewer lines and water lines. This claim was denied. (R. 5-6.)

(c) Damages were also sought by reason of various delays allegedly caused by the Government. Failure of the Government to provide a complete delivery schedule; failure to provide suitable sites and the lack of their availability; issuance and then changing notices to proceed; cancelling and changing site locations; scattering sites over wide areas instead of grouping them as originally intended; and directing and compelling petitioner to operate at such times and under such circumstances and conditions that petitioner's costs were increased substantially, make up the substance of this claim. (R. 8.)

(d) Petitioner also claimed damages by reason of the Government's failure to issue exemption certificates for federal excise taxes, forcing petitioner to pay its suppliers and the United States Treasury Department $12,064.91 (R. 3). Although no specific provision of the contract provided for

the Government's issuance of such certificates, petitioner contended that the requirement must be deemed part of the contract by virtue of prior negotiations, custom and practice between the parties (R. 2).

The Government moved for summary judgment as to the entire complaint (R. 13-20). On the authority of this Court's decision in *United States* v. *Wunderlich,* 342 U.S. 98, the motion was granted by the Court of Claims except as to that count based upon the claimed tax exemption (R. 104-105), as to which further proceedings were ordered.

ARGUMENT

1. *United States* v. *Wunderlich,* 342 U.S. 98, disposes of petitioner's contention on the merits.[1] Petitioner's effort to avoid the rule of that case by arguing that questions of law are presented is without merit. Analysis of the actual issues in the case demonstrates that nothing more than questions of fact, plainly within the scope of the standard disputes clause, are presented.

(a) Petitioner contends that the moisture conditions causing the damage to installations in the units were not due to leaky roofs which were the result of faulty material or workmanship, as maintained by the Government (R. 31-2, 88), but were the result of condensation and the high humidity of the areas where the units were located, coupled

[1] See, also, *Kihlberg* v. *United States,* 97 U.S. 398; *Sweeney* v. *United States,* 109 U.S. 618; *United States* v. *Moorman,* 338 U.S. 457.

with the nature of the material specified due to wartime conditions (R. 11). It is apparent therefore that a question of fact as to the cause of the moisture conditions was involved since liability for roof leaks due to defective material or workmanship is conceded by petitioner (R. 10).

(b) Only questions of fact are present in petitioner's claims for extra costs because of extraneous conditions encountered in the erection and installation of the units. Article 4 of the contract (see Appendix, *infra,* p. 12), which deals with changed conditions, provides that modification of the contract to provide for any increase or decrease of cost and/or difference in time resulting from such conditions as are alleged to have been encountered in this case, shall be made by the contracting officer with the department head's approval. The situation in the present case was thus anticipated by the parties and adequate provision made. Furthermore, it is purely a question of fact whether there are "conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications."

(c) Petitioner's contention with regard to damages for delay may be similarly treated. The argument (Pet. 7) that "constructive conditions" in the contract were thus breached by the Government runs counter to the decisions of this Court in

Crook Co. v. *United States,* 270 U.S. 4, *United States* v. *Rice,* 317 U.S. 61, and, most recently, *United States* v. *Howard P. Foley Co., Inc.,* 329 U.S. 64. There, in rejecting a similar contention by a contractor and requiring an express contract provision to impose liability upon the Government for delays, this Court stated (329 U.S. at 69):

> This contract, like the others [*Crook* and *Rice*] shows that changes and delays were anticipated and provided for. The question on which all these cases turn is: Did the Government obligate itself to pay damages to a contractor solely because of delay in making the work available? We hold that it did not for the reasons elaborated in the *Crook* and *Rice* decisions.

The fact situation in the present case coupled with the terms of this contract inevitably leads to a result identical with *Crook, Rice* and *Foley.* Only Article 9 (see Appendix, *infra,* p. 14), the delays-damages clause, offered relief to the contractor for delays caused by the Government. That relief was an extension of time on proper application by the contractor through the contracting officer and department head whose decision was to be final. In the *Crook* case, referring to a similar clause, this court stated (270 U.S. at 6): "* * * which [the delays clause] though probably inserted primarily for the contractor's benefit as a ground for extension of time, is not without a bearing on what the contract bound the Government to do." The *Foley* decision applies the same principle.

Petitioner attempts to avoid the *Crook* and *Foley* decisions on the basis of later Court of Claims' rulings which impose liability where the delay was attributable to lack of diligence or some other fault on the part of the Government. We do not concede the validity of this distinction in view of the rationale underlying *Crook, Rice* and *Foley*. It is our position that every question with regard to delay, by virtue of the provisions of Article 9, falls within the purview of the disputes clause procedure to which petitioner is contractually bound. However, even if the distinction which the Court of Claims decisions have occasionally applied be taken *arguendo* as sound, petitioner cannot succeed. For implicit in the Court of Claims action in sustaining the Government's motion for summary judgment is the decision, on the basis of the pleadings, depositions, admissions and affidavits presented, "that there is no genuine issue as to any material fact" (Rule 51 (c), Rules of Court of Claims. It is apparent, therefore, that the Court of Claims, which itself utilizes the distinction on which petitioner seeks to rely, has found that, on the facts of the present case, there was no occasion for its application.

2. Petitioner attempts (Pet. 12) to evade the *Wunderlich* rule by a contention that the Act of July 10, 1952, the Department of Defense Appropriations Act of 1953, Title VI, Section 635, evinces a congressional intent to nullify Article 15 not only with regard to contracts expending money under that Act but also with regard to all contracts en-

tered into by the Government at any time and under any appropriations act. But the statute on its face offers adequate rebuttal. The section of the Act referred to is *sui generis*. No reference is made to contract expenditures under any other appropriations act and no retroactive application is provided. As the instant contract was entered into in 1943 with the National Housing Agency, the Defense Appropriations Act of 1953 can have no conceivable impact.

3. Finally, there is a question whether the order of March 3, 1953—granting the Government's motion for summary judgment as to four counts of the complaint, overruling that motion as to the remaining count and continuing the case for trial with reference to that count (R. 104-105)—is a judgment from which certiorari may be sought by the petitioner at this time. See 28 U.S.C. 1255.

Rule 51 of the Rules of the Court of Claims, under which the motion for summary judgment was granted, is, so far as here material, identical with Rule 56 of the Federal Rules of Civil Procedure. Under the latter rule, it is well settled that orders partially granting motions for summary judgment are not appealable but are, rather, pre-trial adjudications that certain issues in a particular case shall be deemed established for the trial of the case. See *Leonard* v. *Socony-Vacuum Oil Co.*, 130 F. 2d 535 (C.A. 7); *Biggins* v. *Oltmer Iron Works*, 154 F. 2d 214 (C.A. 7); 3 Moore's *Federal Practice* (1st ed.), §56.09. Although under Rule 54(b) of the Federal Rule of Civil Procedure a district court has power

to separate several claims in one action upon a determination of the issues material to each claim and to enter separate judgments, which then become appealable judgments, see 3 Moore's *Federal Practice* (1st ed.), §56.09, no such rule is contained in the Rules of the Court of Claims. On the contrary, the specific provisions of Rule 54(b) emphasize the general non-appealability of orders which partially grant motions for summary judgment and negative the need for creation of any comparable power by implication. Rule 54(b) permits an exception only upon the express direction by the district judge for the entry of a final judgment on part of a case, after making appropriate findings. Here, the order entered by the Court of Claims not only falls short of providing a similar basis for implying the entry of final judgment but, on the contrary, plainly shows that the order entered was of an interim nature. The court directed that the Government's "* * * motion for summary judgment is granted as to Counts I, III, IV and V, and overruled as to the matters involved in Count II. The case will be referred to a commissioner of the court for further proceedings limited to the claims set out under Count II of the petition." (R. 104-105.)

CONCLUSION

For the foregoing reasons the decision of the court below is correct and further review is not warranted. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1953.

APPENDIX

The pertinent parts of Contract HA (MICH 20213)cph-105 and Contract HA (MICH 20213) cph-102 are as follows:

> Article 4—Changed Conditions: Should the Contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the Contracting Officer shall be called immediately to such conditions before they are disturbed. The Contracting Officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the Contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions. [R. 4.]
>
> Article 12 of Contract 102 is as follows: Disputes—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer, subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclu-

sive upon the parties hereto. In the meantime the contractor shall diligently proceed with performance. [R. 14.]

Article 15 of Contract 105 is as follows: Disputes—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the Contractor shall diligently proceed with the work as directed. [R. 14-15.]

Article 20. Guarantee — The Contractor shall guarantee each Palace Mobile Expansible House unit against defective material and workmanship, including, but without limitation, excessive spring sets; cracking and sagging of frame members; loosening and breaking of rivets; tearing and cracking of sheet metal stock and welds; rusting of exterior metallic surfaces resulting from inferior or improper rust resistant finishes; failure of paint to withstand cracking, peeling, or excessive checking; roof leaks due to causes other than physical abrasion or tearing; and cracking, splitting, warping, and the rotting of wood structures. This guarantee shall be effective for a period of one year from the date of final acceptance of each unit by the Government. There shall be no final acceptance by the Government of any Palace Mobile Expansible

House unit until each such unit is installed and erected at the site designated therefor. [R. 10.]

Article 9. (a) Delays—Damages. . . .; Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to . . . acts of the Government . . ., if the contractor shall within 10 days from the beginning of any such delay . . . notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto. [This will be found in the certified record on file with this Court.]

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